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SUPREME COURT, U. S.

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No. 878

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

SERTA ASSOCIATES, INC., *Appellant*

v.

UNITED STATES OF AMERICA

On Appeal From the United States District Court for the Northern District of Illinois

PETITION FOR REHEARING

SIGMUND TIMBERG
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Washington, D. C. 20005

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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PETITION FOR REHEARING

Appellant, SERTA ASSOCIATES, INC., respectfully petitions this Court for a rehearing of the order of February 24, 1969 granting the Government's Motion to Affirm and affirming the District Court's judgment, and requests that the Court now vacate that order and note probable jurisdiction.

GROUNDS FOR PETITION

This Petition for Rehearing is submitted to call attention to an alternative ground for noting probable jurisdiction, not made clear in appellant's Jurisdictional Statement—that review in this Court may be limited to the issue of the propriety of a single item of the relief decreed by the District Court. Resolution of this particular issue does not require this Court to

review, or the District Court to reconsider, the District Court's determination that Serta's exclusive territorial trademark-licensing system is unlawful because of its co-existence with illegal resale price maintenance. Appellant's principal concern on this appeal is not with this determination of illegality, but with the crippling effect on Serta's licensees of Section IV(D) of the Final Judgment, permanently enjoining their exclusive right to use the Serta trademarks in their designated areas. This injunction has the drastic effect of divesting each licensee of the goodwill which has been his chief competitive asset and which he has labored industriously and at great expense to develop.

In the instant case, no hearings were held as to the nature of the relief to be decreed, and no evidence was received concerning the purposes and effects of exclusive trademark licensing, which might have shed light on the question of the necessity for permanently enjoining that practice. However, the present record indicates that the prevention of price fixing can be effectively accomplished without the necessity for enjoining exclusive trademark rights for a designated territory. In particular, the record shows:

(a) Serta has whole-heartedly complied with the price fixing prohibitions of the Final Judgment and has undertaken ample measures to remove all vestiges of price fixing and prevent any recurrence (Item 250);

(b) Provisions of the Final Judgment itself, other than Section IV(D), furnish abundant protection against any resumption of price fixing. See the detailed and far-reaching injunctions and enforcement provisions contained in Section IV(a), (b), and (c) and Sections V and VI (Jurisdictional Statement, pp. 16a, 17a).

By its order of January 9, 1968 (Item 181), restricting the evidence to the single issue of the existence of retail price maintenance, the District Court foreclosed Serta from presenting any evidence showing the lack of connection between Serta's licensing of its trademarks for use in designated areas, on the one hand, and the fixing of retail prices, on the other. Also, there is in this case neither evidence nor a court finding that the territorial licensing of Serta's trademarks was "ancillary to price fixing", cf. *White Motor Co.* v. *United States*, 372 U.S. 253, 260, cited in *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365, 375—differentiating this case from *United States* v. *Sealy, Inc.*, 388 U.S. 350. Moreover, the evidence that was introduced shows that, for Serta, price fixing was not "an integral part of the whole distribution system", cf. *United States* v. *Bausch & Lomb Optical Co.*, 321 U.S. 707, 720; *United States* v. *Arnold, Schwinn & Co., supra;* Appendix C, Jurisdictional Statement, pp. 19a-20a.

In decreeing the divestiture of the Serta licensees' exclusive trademark rights and goodwill, the District Court ignored the rule laid down in *United States* v. *Bausch & Lomb Optical Co., supra,* at 728-9, that an otherwise lawful practice will not be permanently enjoined simply because of its co-existence with an illegal restraint, where such a permanent injunction is not necessary to eliminate the illegal restraint. In that case, which was cited several times in the *Schwinn* case (see pp. 373-7), the price-fixing activities were of an aggravated and pervasive nature and were "an integral part" of the entire distribution system. Two devices, the suggestions of resale prices and the use of resale price maintenance contracts under the Miller-

Tydings Act, had been used as a means of effectuating the illegal price-fixing system, and their use was therefore enjoined by the lower court, but only for a six-month period. The Government appealed to this Court, requesting that the decree be modified to make permanent the six-month injunctions. These requests were denied. The economic consequences of a permanent injunction against exclusive trademark licenses in the present case are far more serious to the Serta licensees than would have been the permanent injunctions with respect to price-fixing sought in *Bausch & Lomb*.

Fore the foregoing reasons Serta urgently requests that this case be remanded to the District Court for the purpose of affording Serta the opportunity of introducing evidence to show that price-fixing can be effectively prohibited and guarded against in the future, without the necessity for a permanent injunction divesting the Serta licensees of their exclusive trademark rights and their hard-won good will therein.

Respectfully submitted,

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Certificate Under Rule 58

I, Sigmund Timberg, a member of the Bar of this Court, hereby certify, pursuant to Rule 58 of the Rules of the Supreme Court of the United States, that the foregoing Petition for Rehearing is presented in good faith and not for delay.

/s/ SIGMUND TIMBERG
Sigmund Timberg

Dated: March 20, 1969